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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1943.

No. 848.

LYNBROOK GARDENS, INCORPORATED,
Petitioner,

vs.

BERNARD C. ULLMANN.

PETITION AMICUS CURIAE OF THE STATE TAX COMMISSION OF THE STATE OF NEW YORK IN SUPPORT OF WRIT OF CERTIORARI.

MORTIMER M. KASSELL,
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HERMAN COHEN,
With him on this petition.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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PETITION IN SUPPORT OF WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, as the State Tax Commission of the State of New York, respectfully urges favorable consideration of the petition for writ of certiorari in the above entitled case now pending before this Honorable Court.

The constitutionality of Title 3 of Article VII-A of the Tax Law of the State of New York is here involved.

History of Article VII-A of the Tax Law.

The collection of unpaid real property taxes in New York has long been a matter of public concern. In general, the procedure for the collection of such taxes is, in effect, to

sell a tax lien at public auction, and if there is no bid, such lien is acquired by the tax district conducting the sale. A conveyance of the property may be obtained by the tax sale purchaser or by the tax district, but titles so conveyed have not been generally accepted because of numerous technicalities in the assessment and levy of the tax and in the procedure for redemption. In 1930, provision was made for the foreclosure of tax liens by action, as in action for the foreclosure of mortgages (section 163 of the Tax Law, as added by Chapter 809, Laws of 1930). However, foreclosing tax liens by that method was expensive, costing at least $100 a parcel, and hence was infrequently invoked.

In 1938, as a result of various studies, it was clear that a less complicated and expensive procedure for the foreclosure of tax liens in New York had become a matter of public necessity. There was a tremendous amount of unpaid real property taxes due the various localities of the state. In a study made by the State Planning Division of the Executive Department (Problems Created by Premature Subdivision of Urban Lands in Selected Metropolitan Districts), it appeared that, considering only five cities of the state and forty-seven of the sixty towns in three counties, of 292,901 vacant lots and lands on the tax rolls, 162,771 were in arrears for taxes and assessments. Many of these taxes had been in arrears since 1917, and the greater part had been in arrears as early as 1931. Indeed, in many cases the accumulated arrears of taxes were well in excess of assessed valuations.

Because of public distrust of tax titles, a tax district was unable to sell tax liens to private tax sale purchasers and was required to bid them in on its own behalf. For the same reason, a tax district could not dispose of property

so acquired. The result was a heavier tax burden on other property owners in the district and the creation of "blighted areas", title to which was uncertain and which were not productive of revenue for the tax district. Local tax structures were thereby seriously affected.

Confronted with this situation, the State Tax Commission, the New York State Conference of Mayors and Other Municipal Officials and the Committee on Municipal Law of the New York State Bar Association, collaborated in the preparation of a bill to provide a simpler, more effective and less expensive method of foreclosing tax liens. The bill became Chapter 692 of the Laws of 1939 and added Article VII-A to the Tax Law. Titles 1 and 4 of said Article contained general provisions. Title 2 provided for the foreclosure of tax liens as in the foreclosure of mortgages, both by tax districts and by private tax sale purchasers. Title 3 provided for the foreclosure by action *in rem* of tax liens over four years old, but only by a tax district.

Under the *in rem* method it was estimated that the cost of foreclosure would be less than $5 per parcel, in place of the $100 per parcel under the former procedure.

Public Importance of the Question.

Since the enactment of said Article VII-A the State Tax Commission of the State of New York has urged the numerous tax districts of the state to adopt its provisions and has prepared and furnished the necessary forms to the tax districts. The beneficial effects that were anticipated have been realized through practical experience. The average cost of foreclosure has been under the anticipated $5 a parcel, and many properties have been restored to

the tax rolls as a result of the adoption of said Article by the various cities, villages, towns and counties set forth in the petition herein. Furthermore, many tax districts are awaiting an authoritative decision as to the constitutionality of Article VII-A before adopting its provisions. In addition, since the enactment of said Article in New York, Connecticut and Maryland have enacted similar provisions. (Annotated Code of Maryland (1939 Ed.) Article 81, secs. 90-q to 90-u, inclusive, as enacted by Chapter 761 of the Laws of 1943; Conn. P. A. 1943, Chapter 419).

The decision of the Court of Appeals does not decide the constitutional validity of Article VII-A. Consequently, title to thousands of parcels of real estate in New York which have been foreclosed by tax districts is left unsettled.

It is of primary importance to the real property tax system of the State of New York that this question be authoritatively determined.

WHEREFORE, the State Tax Commission of the State of New York respectfully prays that the petition herein be granted.

Albany, N. Y., April 15, 1944.

MORTIMER M. KASSELL,
Counsel to the State Tax Commission,
State Office Bldg.,
Albany, N. Y.

HERMAN COHEN,
With him on this petition.

No. 848

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMAN,

Respondent.

PETITION FOR PERMISSION TO SUBMIT A BRIEF AS AMICUS CURIAE

MILTON PINKUS,
Attorney for Anne M. Leach,
Amicus Curiae.

EUGENE R. HURLEY,
Of counsel.

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Supreme Court of the United States

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMAN,

Respondent.

PETITION FOR PERMISSION TO SUBMIT A BRIEF AS AMICUS CURIAE

To The Honorable The Chief Justice Of The Supreme Court of The United States Of America And The Honorable Associate Justices Thereof:

Your petitioner, ANNE M. LEACH, is a property owner in the County of Nassau, which property is subject to, or might become subject to the provisions of Article 7-A of the New York State Tax Law. As such owner, she has an interest in the outcome of the litigation herein, which has as its avowed object the testing of the constitutionality of that Statute.

Your petitioner has been permitted to file a brief as amicus curiae in the Supreme Court, Appellate Division and the Court of Appeals in the New York State Courts, and prays for permission from this Court to file the accompanying brief as amicus curiae on this application for a writ of certiorari to the Court of Appeals of the State of New York.

Your petitioner has been informed orally that the parties to the action have or will consent to the submission of such a brief.

MILTON PINKUS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMAN,

Respondent.

BRIEF FOR ANNE M. LEACH, A PROPERTY OWNER IN THE VILLAGE OF LYNBROOK AS AMICUS CURIAE

The law involved here provides a new method of creating a so-called tax title to real property. So far as is known there is no method of selling lands for taxes in the State of New York which has ever been held unconstitutional. Taxes have been held unconstitutional, but never methods of collecting them by a sale of the land. The constitutionality of this particular method had been expressly upheld by the New York Court of Appeals before the present action was commenced (*City of Utica* v. *Proite*, 288 N. Y. 468).

The real difficulty which the Plaintiff and the Defendant sought to overcome by the present action is the question of the marketability of the resultant title, and not of the method employed in creating it. The marketability of the title depends, in turn, upon the facts of the cause, e. g., how substantially the procedure commanded by the statute was followed.

The statute does not require that the Plaintiff take possession of the property as in the case of personal prop-

erty. Though the proceeding is one "in rem", as are all foreclosures or forfeitures of land, the possession acquired is purely constructive and statutory and may often be contradicted by the actual fact. Consequently, the important consideration is the existence in each case of the facts on which jurisdiction depends. One of these facts would be the existence of an unpaid tax. Without that, no matter what forms were gone through, no jurisdiction could be obtained and the formal title would be invalid.

All title insurance companies and all lawyers examining titles consider the foregoing statement of law as evident —indeed, obvious.

The proponents of the law, however, entertain a directly opposite opinion. They believe that the form and not the substance should and does control. To put their position in concrete terms, they believe that by means of the procedure authorized by this law, the municipality can vest itself with a valid title to a man's house in which he is residing even though he has paid the taxes lawfully levied thereon and holds the receipts for such payments.

To obtain a ruling on this point, the Plaintiff and Defendant entered into the contracts and commenced this action.

The object of this brief is to persuade the Court that the petition for a writ of certiorari should be denied.

Why the Petition Should Be Denied

I. There is no controversy between the parties.

Both the Plaintiff and Defendant believe strongly in the validity of titles made under this statute, no matter what the facts. Both the parties, as well as all but one

of the amici curiae, were interested in supporting rather than testing the resultant title. Under such conditions, an authoritative decision is almost impossible. The facts as to the payment of the tax by the former owner are suppositions. As Mr. Justice Carswell pointed out in the Appellate Division, the former owner is not a party to the action and what the actual parties seek is an unauthorized advisory opinion. Under those circumstances, a solemn decree of specific performance, or denying it, is unseemly.

II. There is no constitutional question involved. The dismissal of the complaint rests on a non-federal ground.

In the first place, the constitutionality of the statute has been established (*City of Utica* v. *Proite,* 288 N. Y. 468).

Secondly, specific performance will not be decreed where there is real danger of a lawsuit as to the title (*Fleming* v. *Burnham,* 100 N. Y. 10). The reality of that danger in this case may be conceded to be doubtful, since the facts of payment of the tax are admittedly suppositious. Nevertheless, the Court of Appeals evidently considered that a decree would be improper where the Court's judgment would not bind the former owner. It is noticeable that it dismissed the complaint and did not decree any return of the deposit. The parties had entered into an unenforcible contract and could have no relief against each other.

III. There is no question of public importance involved.

The petitioner seems guilty of some exaggeration here. There is nothing in the record to substantiate any of its claims. But it will be noticed that the Plaintiff has appended to its complaint a copy of its foreclosure list containing *all* of its unpaid taxes from the incorporation of the Village to a period four years before the filing. Many of these were doubtless paid or redeemed before judgment, but if we assume none of them to have been, their grand total forms a very, very small percentage of the annual budget of the Village of Lynbrook which is more than $300,000.00 a year.

The petitioner does not mention the fact that under alternative methods of enforcement, thousands upon thousands of properties are annually foreclosed for taxes and sold to builders, who obtain title insurance and mortgages thereon, and that in most such cases the municipality has recovered all its taxes and all of its expenses. It could have added that some of these properties were located in the Village of Lynbrook.

The Petition should be denied.

Respectfully submitted,

MILTON PINKUS,
Attorney for Anne M. Leach, Amicus Curiae.

EUGENE R. HURLEY,
Of counsel.

(10)

MAY 6 1944

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 848

LYNBROOK GARDENS, INC.,

Petitioner,

against

BERNARD C. ULLMANN,

Respondent.

PETITION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

L. ARNOLD FRYE,

Counsel for the

Counties of Chautauqua, Chemung, Erie, Orange and Steuben,

Town of New Castle,

Cities of Amsterdam, Auburn, Batavia, Buffalo, Dunkirk, Elmira, Glens Falls, Jamestown, Lackawanna, Newburgh, New Rochelle, Poughkeepsie, Rochester, Schenectady, Utica and Yonkers,

Villages of Blasdell, Cedarhurst, Floral Park, Freeport, Garden City, Hempstead, Johnston City, Lynbrook, Mamaroneck and Valley Stream,

as *Amici Curiae.*

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PETITION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND ASSOCIATE JUSTICES THEREOF;

Your petitioners, the Counties of Chautauqua, Chemung, Erie, Orange and Steuben, the Town of New Castle, the Cities of Amsterdam, Auburn, Batavia, Buffalo, Dunkirk, Elmira, Glens Falls, Jamestown, Lackawanna, Newburgh, New Rochelle, Poughkeepsie, Rochester, Schenectady, Utica and Yonkers, and the Villages of Blasdell, Cedarhurst, Floral Park, Freeport, Garden City, Hempstead, Johnson City, Lynbrook, Mamaroneck and Valley Stream, are all taxing districts of the State of New York which either have adopted Article VII A of the New York Tax Law or will adopt the same if it is held valid, and are therefore interested in the issue before the Court in the above entitled cause. Your petitioners respectfully request leave to file the annexed brief as *amici curiae* in

support of the petition for a writ of certiorari. Consent of the parties to the filing of such brief is submitted herewith.

Statement

The history of this litigation and the questions involved therein have, we believe, been sufficiently stated in the petition and briefs heretofore filed, and will not be repeated here.

Reasons Relied on for the Allowance of the Writ

1. *The statute was intended to give needed relief to New York municipalities. Its constitutionality should not be allowed to go undecided.*

The purpose of Article VII A was to provide a simple and inexpensive method of reclaiming real property which has been abandoned to tax arrears. Such properties are frequently grouped together to form large areas. Usually the individual tax lots in such arrears are of small value and because the owners have taken no interest in them for many years, titles are often involved, with the result that the cost of foreclosure (by the methods available before the enactment of Article VII A) is high. Foreclosure under Article VII A makes such blighted areas again available for some useful purpose at a cost commensurate with the low value of the land. It seems to us, therefore, that Article VII A has a proper social and economic purpose.

The only issue raised below was whether or not the statute was constitutional. The lower courts in New York might have refused to enforce the contracts set forth in the complaint if they believed that a substantial question as to the constitutionality of the statute was presented.

This, however, would not have prevented the plaintiff from taking the case to the Court of Appeals.

Ferry v. *Sampson*, 112 N. Y. 415.

The Court of Appeals recognized the principle that a contract for the sale of real property will be enforced where the decree itself constitutes an authoritative determination of the doubtful question (Opinion by Lehman, Ch. J., R. 212). Nevertheless, the court refused, in terms, to pass on the constitutionality of the statute on the ground that its decision would not be authoritative. It expressly stated, however, that the grounds upon which the constitutionality of the statute had been challenged, were substantial (R. 218). In effect, therefore, the court did pass on the constitutionality of the statute and, for all practical purposes has made it unavailable for the purposes and uses for which it was intended.

The Court of Appeals could not have reached the result it did without passing on a federal question, to wit, whether or not there is a substantial doubt as to the constitutionality of Article VII A under the Federal Constitution. This Court can authoritatively pass on the constitutionality of the statute. We respectfully submit that the question should be decided.

Foster v. *Scott*, 136 N. Y. 577;
Pomeroy on Specific Performance, 3rd Ed. 1926, par. 202 et. seq.

2. *The matter is one of great public importance.*

The facts with respect to the public importance of the cause have been set forth in the petition and briefs heretofore filed herein.

The importance of the cause is further indicated by the appearance of the member cities of the National Institute of Municipal Law Officers, and the State Tax Commission of the State of New York, as *amici curiae*.

Conclusion

WHEREFORE, we respectfully pray that the petition herein be granted.

L. ARNOLD FRYE,

Counsel for the

Counties of Chautauqua, Chemung, Erie, Orange and Steuben,

Town of New Castle,

Cities of Amsterdam, Auburn, Batavia, Buffalo, Dunkirk, Elmira, Glens Falls, Jamestown, Lackawanna, Newburgh, New Rochelle, Poughkeepsie, Rochester, Schenectady, Utica and Yonkers,

Villages of Blasdell, Cedarhurst, Floral Park, Freeport, Garden City, Hempstead, Johnson City, Lynbrook, Mamaroneck and Valley Stream,

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